

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.5
Repeal Section 749.2
Title 14, California Code of Regulations
Re: Animals of California Declared to Be Endangered or Threatened

- I. Date of Initial Statement of Reasons: February 2, 2004
- II. Dates and Locations of Scheduled Hearings:
- (a) Notice Hearing: Date: February 5, 2004
Location: Long Beach, CA
- (b) Adoption Hearing: Date: May 6, 2004
Location: San Diego, CA
- III. Description of Regulatory Action:
- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:
- Section 670.5 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of animals designated as endangered or threatened in California. The Commission has the authority to add or remove taxa from this list if it finds that the action is warranted.
- Xantus's Murrelet (*Synthliboramphus hypoleucus*) is known to nest on only 12 islands scattered along 500 miles of coastline from the Channel Islands in southern California, to Guadalupe Island in Baja, Mexico. Worldwide population size is estimated at 4,155 pairs, with 42% of the world population nesting in the USA. Most nesting populations occur on islands managed by the National Park Service (NPS), though one population nests on US Navy property (San Clemente Island). There is no NPS management plan specific to recovery of the Xantus's Murrelet (murrelet), though a rat removal project on Anacapa Island is expected to eventually have a significant benefit to murrelets. The US Navy recently completed an Integrated Natural Resource Management Plan that contains elements which should prove beneficial to murrelets. However, at this time, it is too early to determine if significant portions of the plan have been implemented, or if murrelets have benefited from any management actions.
- The murrelet is threatened by extensive habitat modification which

occurred in the past, and which resulted in ecosystem changes, including changes in predator/prey relationships from which the murrelet has yet to recover. Habitat modification was primarily the result of vegetation change caused by non-native grazing mammals, agricultural practices, military activities, and fires. The introduction of non-native predators (rats and cats) caused population declines. However, native predators (deer mice and barn owls) are also contributing to documented population declines. Mortality from an oil spill is also potentially significant, especially if a large spill occurred during the breeding season.

The worldwide nesting distribution of the murrelet is limited to six of the Channel Islands, and six small islands along the Pacific Coast of Mexico. This limited distribution, coupled with small population size (estimated at 1,730 pairs in the Channel Islands) makes the murrelet a rare seabird on a global scale. Documented population decline, small population size, and numerous threats lead the Department to conclude that the species is likely to become endangered throughout its range in the foreseeable future in the absence of special protection and management efforts. The protection of the California Endangered Species Act (CESA) is necessary to prevent further decline and potential extirpation in California.

On October 23, 2002, the Commission designated the murrelet as a candidate for listing under CESA and notice to that effect was prepared and filed with the Office of Administrative Law. During the one-year candidacy period, the Department of Fish and Game (Department) evaluated the status of the murrelet and completed a report regarding the status of the species in November 2003. Based on this analysis, the Department recommended to the Commission that the murrelet be listed as threatened under CESA.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 2070 and 2075.5, Fish and Game Code.

Reference: Sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2075.5 and 2077 Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change: None.
- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list the Xantus's Murrelet as a threatened species (Pacific Seabird Group, April 10, 2002). Report to the California Fish and Game Commission: Status Review of Xantus's Murrelet (*Synthliboramphus hypoleucus*) in California (November 2003).

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

The Commission will hear public testimony at its February 5, 2004, meeting, prior to publication of the notice. Public testimony was previously taken at the October 23, 2002 meeting, and two letters on the subject listing were received by the Commission. These two letters are included in the Status Review report referenced above under section III (d).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) List as Endangered:

The Commission could exercise its discretion and list the Xantus's Murrelet as an endangered species under CESA. The legal protection afforded species listed under CESA as endangered or threatened, however, is the same. Likewise, required heightened scrutiny of significant impacts on Xantus's Murrelet under the California Environmental Quality Act (CEQA) for endangered, rare or threatened species would be the same if the Commission decided to list the species as endangered, as opposed to listing as threatened (See Cal. Code Regs., tit. 14, §§ 15065, 15380). Finally, sources of potential funding for recovery, protection, and research for endangered species are generally the same as those for a threatened species.

(b) Decline to List (No Change Alternative):

If the Commission determines that listing is not warranted, the murrelet will revert to the unlisted status that it held prior to the petition filing. As a California Species of Concern, the murrelet may be afforded some protection under CEQA. The Department will continue to act as the trustee agency for the State's fish, wildlife and plant resources. In this role, the Department will review and comment on impacts to murrelets and recommend mitigation measures for these impacts as part of the lead agency CEQA review process. Likewise, where the Department or Commission acts as a lead agency under CEQA, significant impacts on Xantus's Murrelet will be avoided or mitigated to the extent feasible.

Should the Commission decline to list, incidental take permitting requirements set forth in FGC 2081(b), and other protective measures under CESA would not apply. Federal and State research permit requirements that existed prior to the petition filing will, however, remain in place. For example, the Department will continue to require Scientific Collecting Permits and Letter Permits for research projects that involve take of murrelets. Researchers would also be required to obtain the appropriate federal permits for work involving take of murrelets.

In the absence of a listing decision by the Commission, the Department would also continue to participate in and support a variety of programs designed to benefit murrelets. Many of the Department's existing or

planned management efforts, conducted in cooperation with other entities include:

- Rat eradication at Anacapa Island under the American Trader Restoration Plan.
- Research and monitoring studies funded through the State's Tax Check-off Program, or U.S. Fish and Wildlife Service Section 6 grant program.
- Development of information and educational materials for various user groups.
- Working with various State and federal agencies, and private groups to help conserve murrelets.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The Administrative Procedure Act (APA) requires state agencies to assess the potential for adverse economic impacts whenever they propose to adopt, amend, or repeal any administrative regulation (see generally Gov. Code, §§ 11346.3, 11346.5). The APA also requires state agencies to adhere to the economic assessment requirements to the extent such requirements do not conflict with other provisions of state or federal law (*Id.*, § 11346.3, subd. (a)).

The information and criteria by which the Commission is required to determine whether a species should be listed under CESA as threatened or endangered are limited to biological considerations (see, e.g., Fish & G. Code, §§ 2062, 2067, 2074.6). There is also state case law indicating that economic considerations may not be considered by the Commission when designating a species as a candidate for listing under CESA (*Natural Resources Defense Council v. California Fish and Game Comm.* (1994) 28 Cal.App.4th 1104, 1117, fn. 11).

Due to the conflict between APA and CESA listing procedures as noted above and further described below, the potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required

statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States.

While the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designating Xantus's murrelet as threatened will subject the species to the provisions of CESA, including the prohibition on take except as may be permitted by the Department. The designation of Xantus's Murrelet as a threatened species under CESA is not expected to result in significant statewide adverse economic impacts directly affecting businesses, including the ability of California businesses to compete with businesses in other states, for the reasons discussed below.

Where the Department authorizes take of Xantus's murrelet that is incidental to an otherwise lawful activity, impacts of the taking must be minimized and fully

mitigated, and any such mitigation must be monitored for effectiveness under CESA. Permitting under CESA for incidental take of Xantus's murrelet will result in increased cost when compared to the status quo, but these costs are not expected to be significant statewide adverse economic impacts because of the limited range of the species within California.

Designating the Xantus's murrelet as a threatened species could also result in increased mitigation costs under CEQA to public agencies, businesses and other persons in California. These increased costs are also not expected to be significant and adverse on a statewide basis given the limited range of the species within California. Likewise, these increased costs are not expected to be significant and adverse on a statewide basis because the rarity of the species may already subject projects with the potential for significant adverse impacts on the species or its habitat to heightened scrutiny and related mitigation obligations under CEQA (CEQA Guidelines, Sections 15065, 15380).

Project costs as a result of CEQA and CESA may include, but are not limited to protection and purchase of off-site habitat, development and implementation of management plans, establishment of new populations, predator management, establishing a nest box program, protection of additional habitat, and long-term monitoring. Even with these potential costs, the Department may identify innovative ways to avoid potential take of murrelets, such as through educational efforts, proper signing of nesting areas, and letter agreements with various public agency and private sector stakeholder groups. These efforts may eliminate the need for mitigation measures and their associated costs, at least in some instances.

A potential economic benefit of listing for the local economy and the Department could result from viewing and interpretation activities involving Threatened and Endangered wildlife. Persons interested in such activities would spend money in local communities for food, lodging, equipment, and transportation. The murrelet could be included in wildlife interpretation programs and thus contribute to public education about Threatened and Endangered species. Increased public education could result in increased contributions to the State's Rare and Endangered Species Tax Check-off program, which would in turn provide further funding for management and recovery activities for all listed species. Private tour operators could also potentially benefit economically from increased tourism, interpretation, and educational activities.

Additionally, private biological consulting firms could benefit economically from assisting in the development and implementation of mitigation measures. Such firms specialize in acting as a liaison between the Department and permit applicants.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

Designating the Xantus's murrelet as a threatened species under CESA is not

expected to result in a significant impact on the creation or elimination of jobs within the State, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses in California. In contrast, listing the species as threatened under CESA could result in economic impacts to certain businesses in and around documented nesting and foraging habitat for the species, including the Channel Islands. These businesses include the commercial squid fishery, other sport and recreational fisheries, and commercial recreational businesses engaged in, for example, sea kayak tours and sport diving. Economic impacts to these businesses could result from permitting costs under CESA where incidental take authorization from the Department is requested. Because it is unclear whether or the extent to which these commercial activities result in take of Xantus's murrelet as defined by State law, permitting related costs are also difficult to estimate at this time.

As was noted in the section above (VI)(a), there may be offsetting costs that balance out in the long run, resulting in no net significant adverse economic impacts on jobs or businesses from listing the murrelet as threatened (see also section VI d, below). Maintenance of sustainable fisheries and an ecologically balanced natural environment, and maintenance of recreational/tourism activities in the Channel Islands area where the murrelets nest will help assure economic vitality and a diversity of jobs in the State over the long term.

(c) Cost Impacts on a Representative Private Person or Business:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities subject to CEQA. CEQA presently requires private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380).

Any added costs should be more than offset by savings that would be realized through the information consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an early stage in project planning and development, thereby avoiding conflicts later in the CEQA review process, which would be more costly and difficult to resolve.

Actual cost impacts are difficult to determine since the Department has not fully evaluated innovative ways to inform and educate all entities in the Channel Islands area with the potential to take murrelets. If extensive public outreach is undertaken to a variety of user groups (including sport divers, sea kayakers, hikers, market squid fishermen, etc.), take of murrelets can be avoided or minimized, and the need for mitigation measures and their associated costs can also be reduced. The Department can also utilize the educational outreach abilities of other entities such as private conservation organizations and federal land management agencies to help inform the public of actions they can implement to minimize take of murrelets. Significant cost impacts on representative private persons or businesses are not expected as a result.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

State agencies will incur some costs associated with developing measures for avoiding, minimizing, mitigating, and monitoring potential impacts to murrelets under CEQA and CESA. These costs are associated with, among other things, staff time incurred during the issuance of incidental take (FGC 2081(b)) permits, and include consultation, project development, and project approval and monitoring processes. Educational and outreach activities by Department staff will also involve some state costs due to staff time and development of educational materials. However, some of these costs may be covered by oil spill restoration funds awarded to Trustee agencies, including the Department.

The Department may benefit from some federal funding for murrelet conservation actions via the US Fish and Wildlife Service Section 6 grant process, or other federal funding sources for wildlife conservation.

- (e) Other Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs Mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend Section 670.5 of Title 14, CCR, to add Xantus's Murrelet (*Synthliboramphus hypoleucus*) to the list of threatened birds (Subsection (b)(5)). The Department's recommendation is based upon limited distribution and small population size, and the documentation of population declines and threats to the species, to the point that the Department believes the species meets the criteria for listing as threatened by the Fish and Game Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. Xantus's Murrelet is rare in California, and restricted to six nesting islands in the Channel Islands of southern California. Population decline is ongoing at the largest colony on Santa Barbara Island based on National Park Service monitoring efforts.